

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Mount Hope Waterpower Project, L.L.P.

Project No. 9401-065

ORDER DISMISSING APPEAL OF ANNUAL CHARGES STATEMENT AND
DENYING REQUEST FOR WAIVER OF ANNUAL CHARGES

(Issued June 21, 2007)

1. In this order, the Commission dismisses Mt. Hope Waterpower Project, LLP's (Mt. Hope) appeal of its annual charges statement and denies its request for a waiver of administrative annual charges assessed for the Mt. Hope Pumped Storage Project No. 9401.

Background

2. In 1992, the Commission issued a license to the Halecrest Company for the construction and operation of the 2,000-megawatt Mount Hope Pumped Storage Project.¹ In 1994, the project license was transferred to Mt. Hope.²

3. Mt. Hope requested and received an extension of the deadline for commencement of construction until the statutory deadline of August 3, 1996, pursuant to Federal Power Act (FPA) section 13.³ After failing to meet the extended deadline, Mt. Hope secured

¹ *Halecrest Company*, 60 FERC ¶ 61,121 (1992).

² *Halecrest Company and Mt. Hope Waterpower Project, LLP*, 68 FERC ¶ 62,008 (1994).

³ 16 U.S.C. § 806 (2000).

legislation authorizing the Commission to grant additional extensions of the deadline for commencement of construction, with a final deadline of August 3, 2002.⁴

4. Meanwhile, the licensee filed a request for rehearing and waiver of its 1993 administrative annual charge bill. The Commission denied that request in its entirety, but allowed the licensee to enter into a deferred payment agreement with the Commission's Chief Financial Officer whereby payment was deferred until the earlier of the beginning of the fiscal year in which the commencement of construction deadline fell or the licensee received permanent financing for the project.⁵ The payment deadline was thereafter adjusted to reflect changes in the commencement of construction deadline.⁶

5. Mt. Hope was unable to commence construction prior to the final deadline. On December 15, 2005, the Commission terminated the license, as required by FPA section 13.⁷ As of that date, Mt. Hope had paid none of the assessed administrative annual charges. On May 2, 2006, the Commission sent Mt. Hope a Notice of Debt Collection (Notice) seeking payment of the deferred annual charge obligations, which totaled \$6,619,847.17 (principal and interest).⁸

⁴ Pub. L. No. 104-247, 110 Stat. 3147 (1996) authorized the Commission to extend the deadline to August 3, 1999. Pub. L. No. 106-121, 113 Stat. 1637 (1999) authorized a further extension until August 3, 2002.

⁵ *Halecrest Company*, 65 FERC ¶ 61,398 (1993). Under this order, payment was deferred until the earlier of (1) fiscal year 1996 (September 30, 1995) or (2) receipt of permanent financing for the project.

⁶ See agreement dated November 21, 1996, executed by Christie McGue, Commission Executive Director and Chief Financial Officer, and Chris Brenner, President, Mt. Hope.

⁷ *Mt. Hope Waterpower Project, LLP*, 113 FERC ¶ 61,258 (2005).

⁸ The assessment covers the period from license issuance until March 14, 1995. In Order No. 576, the Commission established a policy that administrative annual charges would be assessed for unconstructed projects, effective March 15, 1995, beginning with the commencement of construction. *Charges and Fees for Hydroelectric Projects*, 60 Fed. Reg. 15040 (March 22, 1995), III FERC Stats. & Regs., Regulations Preambles January 1991- June 1996 ¶ 31,016 (Mar. 15, 1995). Existing annual charge assessments as of that date were not waived. *Id.* at 31,302-03.

6. On June 1, 2006, Mt. Hope filed with the Commission's Executive Director an appeal of the Notice. It also filed with the Commission a request for waiver of the deferred annual charges assessment, which we address below.

Discussion

A. Appeal of Collection Notice

7. Although Mt. Hope styles its pleading as an appeal of the collection notice, it does not dispute the existence or amount of its debt. Furthermore, as noted above, the Commission has previously addressed, and denied, rehearing of the annual charge assessments for the Mt. Hope Project, so any argument as to the validity of the assessment would be a collateral attack on the annual charge assessments. For these reasons, we will dismiss Mt. Hope's "appeal" of the collection notice.

B. Request for Waiver

8. Mt. Hope contends that equitable grounds exist for the Commission to waive the debt. The Commission has previously denied a request to waive the annual charges debt, and as discussed below, Mt. Hope presents no new facts or arguments to warrant a different result.

9. First, Mt. Hope states that the public interest would be served by development of the project and having to pay all, or even any, of its debt would preclude it from pursuing its ongoing plans to develop the site.⁹ However, the project license was issued many years ago and has been terminated. We therefore make no assumption that development of a project at the site, or by Mt. Hope as opposed to some other entity, is in the public interest.¹⁰

⁹ In this regard, Mt. Hope states that it has an interest in property at the project site, but that the property is heavily mortgaged. Request for waiver at 7.

¹⁰ Mt. Hope notes that it has filed a preliminary permit application (in Project No. 12641) to study development of a project at the site which, if issued, would give Mt. Hope preferential treatment over any competing applicants for a license to develop the site. However, by order issued June 15, 2006, the Commission dismissed Mt. Hope's permit application because of its failure to commence construction during the many years it held a license and stated that the Commission would not accept another permit application from Mt. Hope. *See* 115 FERC ¶ 61,315 (2006). On rehearing, the Commission concluded that it would accept from Mt. Hope a permit application filed after March 7, 2007, but reached no conclusion regarding the merits of any such

(continued)

10. Second, Mt. Hope states that the purpose of administrative annual charges is to reimburse the United States for its costs of administering the Commission's hydroelectric program. In this regard, it notes that although the formula for allocating those costs among the licensees is not based on the Commission's costs of administering individual licenses, those costs applicable to this license have been minimal, particularly compared to the size of the assessment, being limited primarily to reviewing certain pre-construction plans, the license transfer, and approval of requests for extension of time to commence construction.¹¹

11. Mt. Hope also contends that waiving its debt would be consistent with the rationale of Order No. 576 that relieving unconstructed projects from annual charges would reduce the financial burden on the licensees for such projects, which might help more licensed projects be constructed which would, in turn, help to spread the cost burden of our licensing program among more licensees.¹² Mt. Hope has correctly identified the rationale of Order No. 576, but when that order was issued the Commission decided the policy would apply on a prospective basis only.¹³

12. Mt. Hope further contends that granting its waiver request is consistent with *Allegheny Energy, Inc.*,¹⁴ where the Commission refunded to the licensee of an unconstructed project approximately \$3.2 million of the \$5 million in annual charge assessments paid prior to the licensee's voluntary surrender of the license. There, the licensee paid annual charges for over 14 years while attempting to construct the project in the face of vigorous opposition. The Commission, considering various factors, found that a refund was equitable, but only of that portion of the annual charges collected from the licensee prior to the effective date of the Omnibus Budget Relief Act of 1986 (OBRA).¹⁵ In Mt. Hope's case, all of the annual charges accrued after OBRA was enacted.

application. *See* 116 FERC ¶ 61,232 (2006). On March 8, 2007, Mt. Hope filed another permit application for the site, docketed Project No. 12784. The application is pending before the Commission.

¹¹ Request for waiver at 4.

¹² Request for waiver at 5, *citing* Order No. 576 at 31,303.

¹³ Order No. 576, *supra* n. 8, at 31,308-09.

¹⁴ 91 FERC ¶ 61,121 (2000).

¹⁵ Pub. L. No. 99-509, Title III, Subtitle E, Section 3401 (1986) (codified at 42 U.S.C. 7178).

13. Section 3401 of OBRA requires the Commission to recover *all* of its costs for the fiscal year through annual charges and fees.¹⁶ Issuance of a refund covering the time period following OBRA's effective date would have resulted in an undercollection of the Commission's costs for that period, which would have been a violation of OBRA.¹⁷ Collecting the balance due from Mt. Hope will ensure that the Commission has fully recovered its costs for those fiscal years. If the Commission were to waive Mt. Hope's debt (in part or in its entirety), we would have to re-coup the waived charges by adding them to the current year's program costs and allocating them among existing licensees.¹⁸

14. Finally, Mt. Hope asserts that any attempt to collect the outstanding debt would be futile because its assets are limited to heavily mortgaged property interests at the project site. In this regard, Mt. Hope offers to provide the Commission, on a confidential basis, with more specific information regarding its assets.¹⁹ However, such assertions are best considered in the context of the Treasury Department's collection process.

¹⁶ See Joint Explanatory Statement of the Committee of Conference to Accompany H.R. 5300, H.R. Rep. No. 1012, 99th Cong., 2d Sess. 238, *reprinted in* 1986 U.S.C.C.A.N. 3607, 3883; and *City of Idaho Falls, Idaho, et al.*, 93 FERC ¶ 61,145 at 61,455-56 (2000).

¹⁷ Under the Commission's accounting methods, an accounts receivable (an asset) is established for every bill that is generated. When the bill is paid, the cash (an asset) is used to cancel the account receivable. If an account receivable is written off, the asset/revenue from that bill must be recovered. If not, the Commission would fail to offset its costs for the current year.

¹⁸ Mt. Hope owes \$4.1 million in principal, which if waived would result in an increase in annual charge assessments to other entities of about seven percent.

Mt. Hope also contends that a waiver of its annual charges would be consistent with a February 21, 2003 Commission staff letter waiving annual charges for North Hartland, LLC, in Project No. 2816. However, actions taken by staff pursuant to delegated authority and not scrutinized by the Commission on rehearing do not constitute precedent binding the Commission in future cases. *See, e.g., City of Hamilton, Ohio*, 62 FERC ¶ 61,061 at 61,303 (1993); and *Phoenix Hydro Corp.*, 26 FERC ¶ 61,389 at 61,870 (1984). In any event, it appears that staff overlooked current Commission precedent (as discussed in this order) and moreover lacked the delegated authority to act on the matter. *See* 18 C.F.R. § 375.312 (2002).

¹⁹ Request for waiver at 7.

The Commission orders:

(A) The appeal of the Notice of Debt Collection filed on June 1, 2006, by Mt. Hope Waterpower Project, LLP, is dismissed.

(B) The request for waiver of administrative annual charges filed on June 1, 2006, by Mount Hope Waterpower Project, LLP, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.